Supreme Court, U. S.
FILED
JAN 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1046

MALCOLM J. BARRETT, et al.,
Petitioners,

v.

BERTRAM ZWEIBON, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Malcolm J. Barrett, Alfred E. Camire, H. F. Doherty, Anthony T. Trabik, A. M. Gansky, Gerald C. Holland, R. W. Patterson, Eddie A. Sodolak and W. R. Sweeney, nine present or former agents or employees of the Federal Bureau of Investigation (hereinafter the "F.B.I. petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which reversed an order of the district court dismissing a civil action against them for alleged violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the Fourth Amendment to the United States Constitution.*

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* As is set forth *infra* at p. 10 these petitioners do not think certiorari should be granted at this time but have cross-petitioned solely to preserve for review questions which the Court should consider if it grants the petition filed in this action by Bertram Zweibon, et al.

Opinions Below

The opinion of the Court of Appeals is reported at 516 F.2d 594 and appears as an appendix in the petition for a writ of certiorari filed in this action by the plaintiffs below, Bertram Zweibon, et al. (hereinafter the "Zweibon petitioners").

Jurisdiction

The judgment of the Court of Appeals reversing and remanding this case to the district court was entered on June 24, 1975 and a timely petition for re-hearing was denied on August 29, 1975. On November 17, 1975, Chief Justice Burger extended the time for the filing of a writ of certiorari herein to January 26, 1976. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the President of the United States in the exercise of his constitutional authority to conduct the Nation's foreign affairs may lawfully authorize warrantless electronic surveillances in aid of this responsibility where the information sought is deemed essential to the security of the United States or deemed essential to protect the Nation and its citizens from the hostile acts of a foreign power.

2. Whether Congress intended the civil damages provision of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520, to apply to electronic surveillances conducted pursuant to the foreign relations powers of the President of the United States.

Constitutional and Statutory Provisions Involved

The pertinent portions of the Fourth Amendment and of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2510 et seq. are set forth in the appendix to the Zweibon petition.

Statement

On December 29, 1969, the Soviet Ambassador to the United Nations, Mr. Malik, telephoned the then Deputy United States Representative to the United Nations, William Buffum, to vigorously protest the on-going demonstration of the Jewish Defense League near the Soviet Mission in New York (Def. Exh. B-3(1) ¶ 1). The Soviet Ambassador stated that as a result of the demonstrations the Soviet Mission was unable to function normally, and that the four power talks scheduled to be held the next day should be postponed. *Ibid.*

The same afternoon in Washington, the Soviet Ambassador to the United States, Mr. Dobrynin, telephoned Acting Secretary of State Richardson to protest the "continuing disorders" in New York and particularly the recent vandalism and property damage by Jewish groups to the Intourist-Aeroflot (Soviet Airlines) offices in Manhattan and at Kennedy International Airport and to the Tass Bureau in New York City (Def. Exh. B-4(1)). Ambassador Dobrynin also alluded to the adverse repercussions such actions could have on relations between this country and the Soviet Union. *Ibid.*

On December 31, 1969, Ambassador Beam, the then United States Ambassador to the Soviet Union, transmitted to the Secretary of State an embassy translation of a formal diplomatic protest which he had received that day from the Soviet Union's Ministry of Foreign Affairs concerning the activities of the Jewish Defense League in New York,

including the attacks on foreign missions to the United Nations and the mailing of letters threatening the lives of United Nations representatives. The protest concluded:

> The above-mentioned hostile actions against [the Soviet Mission to the United Nations] and other Soviet official institutions in New York can have serious consequences, the responsibility of which will rest fully on the U.S. Government. *Ibid.*

The anti-Soviet demonstrations and the harassment of Soviet diplomats by the Jewish Defense League continued unabated throughout the winter and spring of 1970. On June 23, 1970, Ambassador Dobrynin called on Assistant Secretary of State Hillenbrand to protest "most strongly" a further incident of harassment by members of the Jewish Defense League who earlier that day broke into the offices of Amtorg Trade Corporation in New York, damaged office property and assaulted two Amtorg employees with sticks. (Def. Exh. B-4(3)). Ambassador Dobrynin informed the Assistant Secretary that to date the Soviet Government had kept knowledge of the incidents of harassment from the Soviet people, but that he was not sure that such secrecy could be maintained in the future, and warned of "unpredictable consequences" should Soviet public opinion become aware of the continued harassment by the Jewish Defense League of Soviet citizens in the United States. *Ibid.*

The increasing frequency of Soviet protests over the continued activities of the Jewish Defense League, coupled with the threat of retaliation by Soviet citizens against American diplomats in Moscow, eventually compelled the State Department to seek the assistance of the Federal Bureau of Investigation. In a memorandum dated June 30, 1970, the State Department advised the Bureau that:

> . . . [Jewish Defense League] activity is beginning to have a negative effect on the conduct of our relations with the USSR. . . . In addition, the JDL's resort to physical violence during its raid on the Amtorg Office raises the possibility of Soviet retaliation against U.S. Embassy personnel in Moscow (Def. Exh. B-1(1) and B-1(2)).

On September 14, 1970 the Director of the Federal Bureau of Investigation requested the Attorney General to authorize the installation of a telephone surveillance on the offices of the Jewish Defense League in New York. In his memorandum* the Director stated three principal reasons for the requested surveillance:

1. The JDL's proclivity for violent attacks against Soviet and Arab diplomatic installations in this country which have resulted in injury to private citizens and law enforcement officials.
2. News media reports that the JDL had threatened to hijack an Arab airliner.
3. The expressed concern of the White House that utmost security be afforded foreign dignitaries visiting New York City during September and October, 1970 on the occasion of the 25th Commemorative Anniversary Session of the United Nations.

Acting on this request by the Director, and his own conversations with members of the National Security Counsel and senior officials in the State Department concerning the negative impact of Jewish Defense League activities on the conduct of the foreign relations of the United States, and the threats and protests by the Soviet Union, the Attorney General, on September 15, 1970, authorized an electronic surveillance of the telephone at

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* Memorandum for the Attorney General of September 14, 1970 (Exhibit I attached to Plaintiffs' Memorandum in support of Plaintiffs' Motion for Summary Judgment).

the offices of the Jewish Defense League in New York City (Pl. Exh. I) (Mitchell Deposition, pp. 4-9) .

Illegal attacks against Soviet installations and officials by members of the Jewish Defense League continued throughout the remaining months of 1970.* Soviet denouncement of Jewish Defense League activities, likewise, continued; official statements from the Soviet Government to the Secretary of State reiterated emphatically that "continued provocations" would have "unfavorable consequences" on future Soviet/American relations (Def. Exh. B-1(3) and B-1(4)). Soviet officials accused the United States of "connivance" in these incidents and advised the State Department not to count on the continued patience of the "legitimately aroused" Soviet society lasting indefinitely (Def. Exh. B-3(4), ¶ 1). In appraising the current Soviet protest, Ambassador Beam stated in a cable to the Secretary of State:

> [The] [F]act [the] Foreign Ministry official spoke in low key tone should not detract from the seriousness with which Soviet Government regards the continuing incidents. Deputy editors USA Institute last week expressed what is probably very real Soviet concern that JDL extremists will attempt kidnap Soviet official: he warned this would have extremely serious impact on US-Soviet relations. While we believe MFA (Soviet Ministry of Foreign Affairs) has hitherto resisted any proposals for retaliation against Embassy or American offices in Moscow, we also believe strong

* On November 23, 1970 two members of the Jewish Defense League were arrested for attempting to ram an automobile through the gate of the Soviet Mission in New York causing injuries to six policemen. *New York Times,* November 26, 1970 at 48. On November 24-25, 1970 there was an explosion at the offices of Aeroflot-Intourist in New York. Earlier in that week incidents were reported at the Tass Bureau in Washington, D.C. The media reported members of the JDL openly took credit for these incidents and threatened further acts of violence. (Def. Exh. B-3(4), ¶ 1)

> statement about Soviet patience wearing thin must be taken at face value. (Def. Exh. B-3(4), ¶ 4)

On December 31, 1970 then Secretary of State Rogers, citing an increased number of anonymous bomb threats directed at Soviet offices in the United States, requested the Federal Bureau of Investigation and other agencies to review their contingency plans in light of a possible surge in anti-Soviet activity (Def. Exh. B-4(6)). The Secretary noted:

> Dept fully concurs with Ambassador Beam's assessment (Moscow's 7657 not sent all addresses) that further incidents of violence would have damaging impact on our overall relations with USSR and possibly trigger reaction against Americans in Soviet Union. (Def. Exh. B-4(6), ¶ 3)

Four days later, January 4, 1971, the Director of the Federal Bureau of Investigation transmitted a memorandum to the Attorney General requesting a second authorization to conduct an electronic surveillance of the offices of the Jewish Defense League in New York City (Pls. Ex. II). Citing recent activities of the Jewish Defense League marked by violence, including harassment of Soviet diplomats in New York, the Director requested the surveillance to gather advance knowledge of the Jewish Defense League's planned activities against Soviet diplomats and institutions in the United States. The Attorney General authorized the surveillance for a three month period on January 4, 1971.

On January 4, 1971, the Soviet Union delivered a protest in which it noted that since the United States had failed to ensure normal conditions for the activities of Soviet institutions in the United States, it should not expect such conditions to be ensured for American institutions in the Soviet Union (Def. Exh. B-4(7)). Four days later, when a bomb exploded in a Soviet Embassy building in

Washington, D.C., another protest note warned the United States that the Soviet authorities would find it difficult to control the emotions of the Soviet people if these incidents continued unabated (Def. Exh. B-3(6)). Ambassador Dobrynin informed Undersecretary Irwin that this bombing incident would definitely damage Soviet-American relations. *Ibid.*

Soviet newspapers Izvestia and Pravda carried full scale accounts of the bombing, and accused the United States of permitting Jewish Defense League "terrorists" to openly threaten Soviet diplomats while taking no protective measures (Def. Exh. B-3(7)). At the same time, the American Embassy in Moscow reported a continued flow of protest letters from Soviet citizens containing general threats of reprisals and more specific threats to "sack" the embassy, along with reports of harassment of American foreign service personnel. *Ibid.*

Acts of violence and published threats against Soviet personnel and installations caused regular Soviet protests during January, February and March 1971 (Def. Exhs. B-3 (11), B-3 (12), B-4 (10)). On March 24, 1971 the State Department notified the U.S. Embassy in Moscow of the protests and advised:

> Dept. would not be surprised if Soviets undertook reprisals in Moscow. (Def. Exh. B-3 (13), ¶ 6)

A week later on March 31, 1971 the Director of the Federal Bureau of Investigation requested a three month continuation of the electronic surveillance of the New York offices of the Jewish Defense League (Pl. Exh. III). The Director informed the Attorney General that the surveillance continued to reveal plans of the Jewish Defense League to harass Soviet diplomats that were otherwise unobtainable. *Ibid.* A three month extension of the surveillance was authorized by the Attorney General on that day.

On October 7, 1973, sixteen members of the Jewish Defense League instituted this civil action against the then Attorney General of the United States, John N. Mitchell, and the F.B.I. petitioners. The filing of this suit followed the disclosure by the Government in two criminal cases* that conversations of certain of the plaintiffs herein had been overheard during the course of the electronic surveillances of the offices of the Jewish Defense League in New York City. In their complaint, the plaintiffs below alleged that their conversations had been overheard during these surveillances from October 1, 1970 until October 31, 1970 and again from January 5, 1971 until June 30, 1971, and that such actions by the defendants were violative of their constitutional rights under the Fourth Amendment and their statutory rights under 18 U.S.C. §§ 2510-2520 and 42 U.S.C. §§ 1983 and 1985 (Comp. ¶ 1 and 12).

On July 20, 1973, the district court entered an order denying the plaintiffs' motion for partial summary judgment and granting defendants' motion for summary judgment dismissing the action (Order of July 20, 1973). The Court concluded that the surveillances at issue were a proper exercise of the President's constitutional authority to conduct the nation's foreign relations and to protect the national security and that Title III of the Crime Control Act of 1968 had no application and could not be invoked with respect to electronic surveillances conducted pursuant to these presidential powers.

The Court of Appeals reversed, holding that the President lacked the power to authorize the surveillances here at issue without obtaining a judicial warrant and that Title III applied to any electronic surveillance which required a warrant. The Court held further, however, that the defendants could defeat both the Fourth Amendment and Title III claims of the plaintiffs if they could demonstrate

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* *United States* v. *Bieber, et al.*, 71 Cr. 479 (E.D.N.Y.) and *United States* v. *Joffee, et al.*, 71 Cr. 480 (E.D.N.Y.).

in the district court that, at the time of the surveillances in question, they acted with a good faith belief that the President, acting through the Attorney General, had the constitutional authority to authorize these surveillances without obtaining a warrant.

Reasons for Granting the Writ

It is the position of the F.B.I. petitioners that a writ of certiorari should not be granted at this time because the decision below was not a final judgment, but simply remanded this case to the district court for a hearing to determine whether the F.B.I. petitioners and their co-defendant, John N. Mitchell, acted with a good faith belief that the surveillances were constitutional. We believe a further development of the record in the district court with regard to the requests from the State Department which led to the institution of these surveillances, and the actions of the F.B.I. petitioners in conducting the surveillances will demonstrate that these were, in fact, foreign intelligence surveillances which were not intended to provide evidence for criminal prosecutions. This further development of the record in the remand proceeding will provide a better basis for a review by this Court of the question of the constitutionality of these surveillances and the application of Title III to this activity.

If, however, this Court is disposed to grant the Zweibon petition, then we respectfully submit that the narrow issue of the scope of the good faith defense available to the F.B.I. petitioners under Title III can not be fairly assessed without consideration of the overriding questions of whether or not the surveillances here at issue were constitutional and whether Congress intended the provisions of Title III to apply to this type of surveillance. This cross-petition is filed solely for the purpose of preserving those issues for review by this Court should it grant the Zweibon petition. See *Strunk* v. *United States,* 412 U.S. 434 (1973).

CONCLUSION

The petition for a writ of certiorari of Bertram Zweibon, et al. should be denied. If, however, that petition is granted this petition should also be granted.

Respectfully submitted,

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January 26, 1976.

Supreme Court, U. S.
FILED
FEB 24 1976
MICHAEL RODAK, JR., CLERK

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JOHN N. MITCHELL, et al., *Respondents.*

No. 75-1059

JOHN N. MITCHELL, *Petitioner,*

v.

BERTRAM ZWEIBON, et al., *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RESPONDENTS IN NOS. 75-1046 AND 75-1059 AND REPLY MEMORANDUM FOR PETITIONERS IN NO. 75-1056

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM FOR RESPONDENTS IN NOS. 75-1046 AND 75-1059 AND REPLY MEMORANDUM FOR PETITIONERS IN NO. 75-1056

As indicated in our original petition (Pet. No. 75-1056, p. 15, n.8), we recognize that the issue on which the court below decided in our favor is important and deserves prompt consideration by this Court. In

order, however, to avoid such consideration and the attendant possibility that the Court might review the "good faith defense" question we have presented and reverse the judgment below, the defendants, in their separate cross-petitions, argue that the court of appeals' ruling is "not a final judgment," and that a more complete factual record "will demonstrate that these were, in fact, foreign intelligence surveillances which were not intended to provide evidence for criminal prosecutions" and, for this reason, a later look "will provide a better basis for a review by this Court of the question of the Constitutionality of these surveillances and the application of Title III to this activity" (Pet. No. 75-1046, p. 11; pet. No. 75-1059, p. 10).

This argument illustrates, however, why it would be unsound for this Court now to defer a decision on any of the important issues presented here, either those raised by us or those put forth by the defendants. The consequence of the assertion made in the cross-petitions is to defer an authoritative and binding ruling on the lawfulness and constitutionality of so-called warrantless "intelligence" wiretaps on domestic organizations until after "further development of the record" (Pet. No. 75-1046, p. 11; Pet. No. 75-1059, p. 10). The court of appeals, however, assumed that in light of its unanimous decision in this case, no *future* wiretap of this kind could be defended as lawful (Pet. 80a, n.279):

> Of course, a good faith belief that warrantless national security surveillance of domestic organizations was constitutional could not be asserted in the future, given the decisions in *Keith* and the case *sub judice*; no such belief could be defended as reasonable. . . .

The defendants have demonstrated by their pleading in this Court that the unanimous holding of the lower court is not viewed by them—and, therefore, possibly not by other government employees—as an authoritative and binding ruling on the question of unlawfulness. If, as they now maintain, an amplification of this factual record may yet render this particular wiretap lawful,[1] then the legality of such conduct will remain undecided for the one to two years that it will take for this case to be heard in the district court and then again to be considered by the court of appeals. There is, consequently, no certainty whatever that the "good-faith defense" might not be asserted in some future proceeding involving a similar wiretap that is in operation today. Such unpredictability on a matter of grave national importance and substantial public attention is, we believe, unjustified.

For the foregoing reasons, the petition for a writ of certiorari in No. 75-1056 should be granted. If our petition is granted while those in Nos. 75-1046 and 75-1059 are denied, it will be a clear indication to those in positions of responsibility that the decision of the court of appeals on the lawfulness of such wiretaps correctly reflects the law. We recognize, however, that the court may deem it appropriate to grant all three petitions and consolidate them for argument. In that event, we submit, the issues presented by the defendants' petitions appear to be those in which the court below focussed its primary attention. Moreover, issues

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[1] It is hard to imagine what evidence to be introduced on remand could more conclusively establish that this was a "foreign intelligence surveillance . . . not intended to provide evidence for criminal prosecution." The court below recognized repeatedly that this was an "intelligence" surveillance (Pet. 37a-47a, 51a-58a), and we did not dispute that characterization.

pertaining to liability logically precede those that relate to any possible affirmative defenses. Accordingly, the defendants (Petitioners in Nos. 75-1046 and 75-1059) should be treated as the principal petitioning parties.

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see

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